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MOHD HADY YA'AKOP v. HASSAN MARSOM & ORS

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
DAVID WONG DAK WAH JCA
VARGHESE GEORGE JCA

B

[CIVIL APPEAL NO: M-01(NCVC)(W)-17-01-2014]
8 JUNE 2016

C

CRIMINAL PROCEDURE: *Police investigation – Remand order – Validity of order – Whether remand order obtained in compliance with s. 117 of Criminal Procedure Code – Whether there was reasonable suspicion or sound basis for detention – Whether there was evidence of suppression of material development in investigation – Whether remand orders obtained in violation of procedures – Whether case of unlawful detention made out – Whether appellant entitled to damages*

D

DAMAGES: *Action for – Injury sustained by reason of breach of statutory duty – Remand order – Whether there was reasonable suspicion or sound basis for detention – Whether remand orders obtained in violation of procedures – Whether case of unlawful detention made out – Whether appellant entitled to damages – Criminal Procedure Code, s. 117*

E

The appellant sought a declaration that his detention by the police between 22 November 2008 and 5 December 2008 was unlawful and in violation of his fundamental rights under the Federal Constitution. He further alleged that he had been assaulted during that detention and suffered injuries for which he was hospitalised for treatment between 22 November 2008 and 28 November 2008. He sought general and special damages, as well as exemplary and/or aggravated damages for the unlawful detention and the pain and suffering he had to undergo. The trial judge found the first, second, third, fourth and seventh respondents were liable only for the injuries suffered by the appellant while in the police custody. However, the declaration sought to the effect that the appellant's detention was unlawful was not allowed, principally for the reason that there was a valid remand order by the Magistrate for the period of the appellant's detention by the police. The issues raised by the appellant in this appeal were: (i) the quantum of damages ordered in his favour for assault and for pain and suffering was grossly inadequate considering the seriousness of the injuries suffered and the ordeal he had to go through; and (ii) the court erred in not declaring his detention to be unlawful since the remand order had been wrongfully obtained without sufficient cause; consequently he ought to be awarded further damages, including exemplary damages, for such unlawful detention.

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Held (allowing application for declaration; affirming quantum of damages)

Per Varghese George JCA delivering the judgment of the court:

(1) It is trite that an appellate court is loath to interfere with sums awarded as damages by a trial court unless it is shown to be manifestly excessive or inadequately low. There was no reason to disturb the quantum awarded by the trial judge for injuries sustained and for the pain and suffering suffered by the appellant during the period he was in police custody. The sums awarded for general damages, exemplary and aggravated damages were consonant with other awards made by the courts under those heads in similarly occasioned or like situations. There was also no reason to disturb the sum of RM100 awarded as special damages. (paras 23 & 24)

(2) A police officer applying for a remand has a duty to satisfy the Magistrate that there were grounds for believing, based on credible information, that the person arrested was involved in a criminal offence and such investigation could not be completed within 24 hours and the accusations must be well-founded. There were two remand orders issued under s. 117 of the Criminal Procedure Code ('CPC') which covered the whole period of the appellant's detention in police custody. The first remand order was obtained by the police from the Magistrate without having adduced to the court, through the arresting officer, relevant material to ground reasonable suspicion or other sound basis to detain the appellant. (paras 26, 36 & 42)

(3) Insofar as the extension order was concerned, there was suppression of a material development in the investigations at that stage, namely that the appellant's story that he was not at the scene of the fight had by then been verified and confirmed by the police; there was therefore no basis for any further detention of the appellant. As the liberty of an individual was at stake, the first remand order and the subsequent extension were improperly and unlawfully obtained. (paras 41 & 42)

(4) Although the remand order and the subsequent extension order issued by the Magistrate under s. 117 of the CPC were seemingly 'legal' on the face of it, it was the direct lapses and the indifference shown to statutory provisions and procedures by the third and fourth respondents that caused the remand orders to be issued by the court. The Magisterial orders were therefore no cover nor could they be relied upon to absolve the respondents from liability for their dereliction of duties which went to the very root of the validity of the orders obtained by the police. (para 43)

(5) The appellant successfully made out a case for the declaration sought, *ie*, that his detention by the police from 22 November 2008 to 5 December 2008 was unlawful and he was entitled to be compensated

with damages for being denied of his liberty and freedom during that period. A lump sum of RM50,000 was fair and reasonable compensation for the unlawful detention attributable to the wrongful acts of the police. Further, it was the respondents' actions, as public servants, in obtaining the remand orders without sufficient cause and in violation of applicable procedures which had resulted in the appellant's basic constitutional rights of liberty and freedom being infringed and negated. Therefore, this was a proper case for exemplary damages to be awarded and thus, a further sum of RM50,000 was awarded to the appellant as exemplary damages. (paras 44-48)

Bahasa Malaysia *Headnotes*

Perayu memohon deklarasi bahawa penahanannya oleh pihak polis antara 22 November 2008 dan 5 Disember 2008 tidak sah dan mencabuli hak asasinya bawah Perlembagaan Persekutuan. Selanjutnya, dia mendakwa telah disakiti semasa penahanannya dan mengalami kecederaan yang menyebabkan dia dimasukkan di hospital bagi menerima rawatan antara 22 November 2008 dan 5 Disember 2008. Dia memohon ganti rugi am dan khas, serta ganti rugi teladan dan/atau teruk bagi penahanan salah dan kesakitan dan kerumitan yang dialaminya. Hakim bicara mendapati responden pertama, kedua, ketiga, keempat dan ketujuh bertanggungan hanya terhadap kecederaan yang dialami perayu semasa dalam tahanan polis. Walau bagaimanapun, deklarasi yang dipohon terhadap penahanan salah tidak dibenarkan, secara asasnya atas alasan terdapat perintah reman yang sah oleh Majistret bagi tempoh penahanan polis. Isu-isu yang dibangkitkan oleh perayu dalam rayuan ini adalah: (i) kuantum ganti rugi yang diperintahkan berpihak kepadanya bagi serangan dan kesakitan dan kerumitan yang dialami amat tidak mencukupi memandangkan keseriusan kecederaan yang dialami dan pengalaman pahit yang dilaluinya; dan (ii) mahkamah terkhilaf apabila tidak mengisytiharkan penahanannya salah kerana perintah reman tersebut diperoleh secara salah tanpa sebab yang mencukupi; dengan itu dia sepatutnya diawardkan ganti rugi lanjut, termasuk ganti rugi teladan, bagi penahanan salah tersebut.

Diputuskan (membenarkan permohonan deklarasi; mengesahkan kuantum ganti rugi)
Oleh Varghese George HMR menyampaikan penghakiman mahkamah:

(1) Adalah matan bahawa mahkamah rayuan tidak akan campur tangan dalam jumlah yang diawardkan sebagai ganti rugi oleh mahkamah bicara kecuali ini terbukti sebagai terlampau besar atau amat kurang. Tiada sebab untuk mengganggu kuantum yang diawardkan oleh hakim bicara bagi kecederaan-kecederaan yang dialami dan kesakitan dan kerumitan yang dialami oleh perayu sepanjang tempoh dalam tahanan polis. Jumlah yang diawardkan sebagai ganti rugi am, teladan dan ganti rugi

teruk selari dengan award-award yang diberikan mahkamah di bawah tajuk dalam situasi serupa. Tambahan lagi, tiada alasan untuk mengganggu jumlah RM100 yang diawardkan sebagai ganti rugi khas.

(2) Pegawai polis yang memohon reman bertanggungjawab memuaskan Majistret bahawa terdapat alasan-alasan untuk mempercayai, berdasarkan maklumat yang boleh dipercayai, bahawa orang yang ditangkap terlibat dalam kesalahan jenayah dan siasatannya tidak boleh diselesaikan dalam tempoh 24 jam dan pertuduhannya mestilah dengan alasan kukuh. Terdapat dua perintah reman yang dikeluarkan bawah s. 117 Kanun Tatacara Jenayah ('KTJ') yang merangkumi keseluruhan tempoh penahanan perayu oleh pihak polis. Perintah reman pertama diperoleh oleh pihak polis daripada Majistret tanpa mengemukakan kepada mahkamah, melalui pegawai yang menangkap, perkara-perkara relevan yang menjadi asas syak munasabah atau asas munasabah lain untuk menahan perayu.

(3) Setakat yang berkaitan dengan perintah lanjutan, terdapat sekatan terhadap perkembangan penting dalam siasatan pada peringkat itu, iaitu cerita perayu bahawa dia tidak berada di tempat pergaduhan berlaku pada masa itu telah pun disahkan oleh pihak polis; oleh itu tiada asas bagi penahanan lanjut perayu. Oleh sebab kebebasan seorang individu menjadi pertaruhan, perintah reman pertama dan lanjutannya diperoleh secara tidak wajar dan tidak sah.

(4) Walaupun perintah reman dan perintah lanjutan dikeluarkan oleh Majistret bawah s. 117 KTJ kelihatan 'sah' secara zahirnya, pengeluaran perintah-perintah reman tersebut oleh mahkamah adalah berdasarkan ketidakpatuhan langsung dan pelanggaran peruntukan statutori dan prosedur oleh responden ketiga dan keempat. Perintah-perintah Majistret oleh itu tidak melitupi dan tidak boleh disandarkan untuk menafikan responden-responden daripada liabiliti atas pelanggaran kewajipan mereka yang memprejudiskan asas kesahan perintah yang diperoleh pihak polis.

(5) Perayu, oleh itu, telah membuktikan kes bagi deklarasi yang dipohon, iaitu, bahawa penahanannya oleh polis dari 22 November 2008 hingga 5 Disember 2008 tidak sah dan dia berhak dipampas dengan ganti rugi kerana dinafikan kebebasan sepanjang tempoh tersebut. Jumlah RM50,000 adalah pampasan yang adil dan munasabah bagi penahanan salah disebabkan oleh tindakan salah pihak polis. Selanjutnya, tindakan responden-responden, sebagai penjawat awam, dalam memperoleh perintah-perintah reman tanpa alasan mencukupi dan dengan melanggar prosedur yang diguna pakai yang mengakibatkan hak asasi dan kebebasan perlembagaan asas perayu dilanggar dan dinafikan. Oleh itu, ini adalah kes yang sesuai bagi ganti rugi teladan diawardkan dan dengan itu, jumlah tambahan RM50,000 diawardkan kepada perayu sebagai ganti rugi teladan.

Case(s) referred to:

Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal [2014] 9 CLJ 15 CA ***(refd)***

Ketua Polis Daerah Johor Bahru, Johor & Ors v. Ngui Tek Choi [2013] 4 CLJ 47 CA ***(refd)***

Masa Nangkai & Ors v. Sgt Edwin Nancha & Anor [2004] 1 LNS 495 HC ***(refd)***

PP v. Audrey Keong Mei Cheng [1997] 4 CLJ 702 CA ***(refd)***

Regina v. Deputy Governor of Parkhurst Prison, Ex Parte Hague [1992] 1 AC 58 ***(refd)***

Roshairee Abd Wahab v. Mejar Mustafa Omar & Ors [1997] 1 CLJ Supp 39 HC ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 23(1)(a), 117, 119

Police Act 1967, s. 32

For the appellant - J Amardas & Terence Chan; M/s KP Ng & Amardas
For the respondent - Muzila Mohamed Arsad; State Legal Advisor, Melaka

[Editor's note: For the High Court judgment, please see Mohd Hady Ya'akop lwn. Hassan Marsom & Yang Lain [2014] 7 CLJ 429.]

Reported by S Barathi

JUDGMENT

Varghese George JCA:

[1] The appellant, who was the plaintiff at the High Court, had in his action sought for a declaration that his detention by the police between 22 November 2008 and 5 December 2008 was unlawful and in violation of his fundamental rights under the Federal Constitution. He further alleged that he had been assaulted during that detention and had suffered injuries for which he was hospitalised for treatment between 22 November 2008 and 28 November 2008. He sought for general and special damages, as well as exemplary and/or aggravated damages, for the unlawful detention and the pain and suffering he had to undergo.

[2] At the end of the trial, the learned judge found that the first, second, third and fourth respondents and the eleventh respondent (vicariously) were only liable for the injuries suffered by the appellant while in police custody and went on to award the appellant:

(i) Damages for injuries suffered:	RM60,000
(ii) Exemplary damages:	RM50,000
(iii) Aggravated damages:	RM50,000
(iv) Special damages:	RM100
	RM160,100

Interest at 4% p.a. was ordered to be paid on the said RM160,100 from 22 November 2008 until full payment.

[3] The learned judge did not, however, allow the declaration sought to the effect that the appellant's detention was unlawful, principally, for the reason that there was a valid remand order by a Magistrate (perintah reman ... teratur dan sah) for the period of the appellant's detention by the police.

[4] The appellant's complaint before us was basically twofold, namely;

(a) that the quantum of damages ordered in his favour for assault and for pain and suffering was grossly inadequate considering the seriousness of the injuries suffered and the ordeal he had to go through; and

(b) the court had erred in not declaring his detention to be unlawful since, on the evidence before the court, the remand order(s) had been wrongfully obtained without sufficient cause; consequently, he ought to be awarded further damages, including exemplary damages, for such unlawful detention.

[5] The respondents, on the other hand, were no longer pursuing their appeal against the finding of liability made by the learned judge. The respondents' contestation before us was confined to the appellant's twofold appeal as noted in the preceding paragraph.

[6] After having heard respective counsel for the parties, we allowed the declaration sought for by the appellant that his detention from 22 November 2008 to 5 December 2008 was unlawful and invalid in law. Flowing from that, we ordered that the appellant was entitled to be further paid by the respondents the following:

(a) Damages for unlawful detention for that duration	RM50,000
and	
(b) Exemplary damages for unlawful detention	RM50,000

[7] We found no reason to interfere with the quantum of damages awarded (including exemplary and aggravated) by the learned judge for injuries and pain and suffering caused to the appellant and accordingly affirmed the same.

[8] We now set out our grounds for our aforesaid decision.

Background Facts

[9] The essential facts surrounding the appellant's allegations as they emerged in evidence at the High Court are captured adequately by the learned judge in the alasan penghakiman at para. 2(a) to (h). It is not intended to repeat the same here.

[10] The pertinent facts insofar as was relevant for this appeal before us are however highlighted below:

A (a) During the early hours of 22 November 2008 the appellant had accompanied one Abdul Manan bin Hassan to Ibu Pejabat Kontinjen (IPK) Bukit Beruang Melaka. Abdul Manan had been asked by the police to present himself there to meet the first respondent.

B (b) The appellant waited in the guard house at IPK while Abdul Manan went in with the first respondent.

(c) Half an hour later, the appellant was brought in by a policeman to the office of the second respondent. That was when his ordeal started. He was taken to a room where there were ununiformed police personnel. He was blindfolded, stripped and assaulted despite his denial he was not C involved in any fight at Restoran Zubaidah (MITC) but had been at another location at the alleged time.

(d) Later in the morning on 22 November 2008 he was produced before a Magistrate and on an application made by third respondent under s. 117 D of the Criminal Procedure Code (CPC), a remand order was obtained for the appellant to be detained from 22 November 2008 to 29 November 2008.

(e) Later, that same day, the appellant together with four others (including Abdul Manan) were taken to the lock-up at Balai Polis Melaka Tengah. E Polis Corporal Nasir bin Jaafar (SD10) who was supervising the lock-up noticed the injuries sustained by the appellant and lodged a police report (D17).

(f) Later on 22 November 2008 at about 7pm the appellant (together with Abdul Manan and two others) were taken to the Malacca General F Hospital on the instruction of the second respondent. The appellant was hospitalised for seven days (from 22 November 2008 to 29 November 2008).

(g) Appellant's remand was extended for another seven days on 28 November 2008 while still being warded at the hospital. He only was G released from police custody on 5 December 2008.

(h) Premised on the police report (D17) lodged by Corporal Nasir bin Jaafar, a special team from Bukit Aman led by SD6 conducted an investigation to determine the circumstances and who were responsible for the injuries sustained by the four persons under remand. H

(i) The result of police investigations ultimately concluded that the appellant was not involved in the fight at Restoran Zubaidah (MITC) and accordingly no charges were brought against the appellant.

I

Insufficiency Of Award Of Damages For Injuries, Pain And Suffering

[11] Counsel for the appellant submitted that the fair and reasonable damages for pain and suffering, for humiliation and trauma still suffered by the appellant, ought to be:

(a) General damages for injuries:	RM150,000
(b) Aggravated damages:	RM100,000
(c) Exemplary damages:	RM100,000

[12] Counsel referred us to the evidence of SP1 and the appellant's medical report and highlighted that the appellant had fainted twice, had difficulty in breathing, had to undergo chest-tube procedure to release pressure in his lungs, was constantly on painkillers, and had to undergo physiotherapy to recover normal breathing functions. While detained at the hospital, the appellant had also remained handcuffed in his bed.

[13] Counsel also stated that the evidence showed that after his discharge, appellant was returned to the lock-up. He was left to sleep on the cold floor until 5 December 2008, when the extended remand period expired.

[14] In response, it was counsel for respondents' submission that the quantum of the damages ordered by the learned judge was in any event, excessive (when compared to the trend of similar awards given by the courts, and further that the special damages (RM100 awarded) was never particularised in the pleadings as required.

Validity Of The Detention, Remand Order(s)

[15] Counsel for the appellant contended that firstly, there was uncertainty as to who had instructed the appellant to be arrested at about 5am on 22 November 2008 and what were the exact grounds for that arrest. The first respondent had stated that the arrest was made on the instruction of one Inspector Salim but it was shown that such instruction was only given at 9am. In this regard, it was pointed out that the first respondent had in his testimony conceded that the appellant's initial arrest was made without proper instruction.

[16] Secondly, it was submitted that the third respondent who subsequently applied for the remand order on the morning of 22 November 2008 also did not know why the appellant had been arrested and could not therefore justify the remand order applied for and obtained. Counsel for appellant argued that the remand order was therefore secured from the Magistrate without sufficient basis or grounds to indicate even a reasonable suspicion to implicate the appellant with the incident under investigation.

[17] Thirdly, with respect to the second or extended remand order, the fourth respondent was being clearly untruthful to the court, in that he did not reveal that by that time (on 28 November 2008) the fourth respondent already was aware that the appellant was physically elsewhere and not at MITC where the fight had occurred.

[18] Further, both the third and fourth defendants had admitted in evidence that s. 119 of the CPC had not been complied with. It was submitted that obviously, therefore, the detention of the appellant by the police officers was 'illegal', right from the outset of his arrest and through the two remand periods.

[19] The submission of counsel for the respondents was however that the detention of the appellant by the police for investigation from 22 November 2008 to 28 November 2008 and then from 28 November 2008 to 5 December 2008 was pursuant to valid and legal remand orders issued by a Magistrate pursuant to s. 117 of the CPC based on applications of the second and fourth respondents respectively, that were 'lengkap and teratur'.

[20] Further, the Magistrate's concerned were satisfied that there were sufficient grounds to issue the remand orders, and apart from the detention being therefore legitimate in law, such orders could only be challenged or set aside by the High Court in the exercise of criminal appellate or revisionary powers. A civil court was therefore precluded from going behind such remand orders made as was being attempted here by the appellant. Counsel referred to the decision of the Court of Appeal in *Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal* [2014] 9 CLJ 15; [2015] 1 MLJ 353 (*Kugan*'s case) which affirmed a similar decision of this court in *Ketua Polis Daerah Johor Bahru, Johor & Ors v. Ngui Tek Choi* [2013] 4 CLJ 47). (See also *Regina v. Deputy Governor of Parkhurst Prison, Ex Parte Hague* [1992] 1 AC 58).

[21] Counsel for respondents further referred us to s. 32 of the Police Act 1967 and cited that provision as effectively providing the police with protection or immunity from liability for damages as sought here by the appellant, that is, since it was similar to a situation where the officer was acting in obedience upon a lawful 'warrant' issued by a competent 'authority'.

[22] Accordingly, the respondents' position was that the court should not make any declaration to the effect that there was an unlawful detention of the appellant here, and/or the respondents were liable for any damages, since the detention of the appellant was in any event sufficiently backed in law by the valid remand orders.

Our Deliberation And Decision

Sufficiency Of Damages For Injuries, Pain And Suffering

[23] Having considered the submissions of the appellant, we found no reason to disturb the quantum awarded by the learned judge for injuries sustained and for the pain and suffering suffered by the appellant during the period he was in police custody. It was trite that an appellate court was loath to interfere with such sums awarded as damages by a trial court, unless it was shown to be manifestly excessive or, on the other hand, inadequately low.

[24] We were not persuaded that either of such situation was the case here. Neither was any alleged error of principle upon which the order of damages had been made by the trial court raised to us. The sums awarded by the learned judge for general damages, exemplary and aggravated damages were, in our assessment, consonant with other awards made by the courts under those heads in similarly occasioned or like situations. We also found no reason to disturb the sum of RM100 awarded as special damages, nominal as it would appear, to the appellant.

[25] We therefore dismissed that part of the appellant's appeal. In the result, the whole of the quantum of damages as ordered by the learned judge for injuries, pain and suffering occasioned to the appellant during the period he was in police custody, was upheld.

Validity Of The Detention; Whether The Remand Orders Were Obtained Without Lawful Grounds Or Sufficient Cause

[26] It was undeniable that there were two remand orders issued under s. 117 of the CPC which covered the whole period of the appellant's detention in police custody, and arguably legitimised the appellant's detention. The crucial question however, in our minds, was whether those remand orders had been obtained from the Magistrate(s) upon sufficient cause being shown or whether the judicial officers concerned had been misled in issuing the remand orders when there were no well-founded grounds to secure those orders in the first place.

[27] At para. 18 of the appellant's plaint we find the following material averments.

> 18. (i) Plaintif menegaskan Plaintif telah ditahan secara tidak sah.
>
> (ii) ...
>
> (iii) Plaintif juga mengatakan perintah remand yang diperolehi tidak mematuhi keperluan undang-undang.
>
> (iv) Secara tambahan Plaintif mengatakan bahawa Defendan Ketiga dan Defendan Keempat **tidak memberitahu Magistret berkenaan brhubung dengan fakta-fakta sebenar mengenai penyiasatan kes berkenaan**.
>
> (emphasis added)

[28] Counsel for the appellant submitted that the observation of this court in *Kugan*'s case *(supra)* did not restrict or necessarily mean that any Magistrate's order of remand could only be challenged or set aside by way of a criminal appeal or revision. It was urged upon us that a collateral attack could still be mounted by way of a civil suit to have the detention pursuant to any such order to be declared to have been 'unlawful', if the 'unlawfulness' of the remand order was expressly pleaded and constituted a specific issue for determination in that suit. Moreover, the appellant's complaint here, it was contended, was not directed so much against the Magistrate's action but against the conduct of the third and fourth respondents in not complying with requirements of the law and not being forthright with the court when securing the remand orders.

[29] The variety of issues and permutations that arise in this area of the law has been captured admirably by my brother judge on this panel, David Wong in the written grounds of judgment issued in the *Kugan*'s case. The salient paragraphs thereof merit reproduction here:

> 18. Learned counsel for the Plaintiff in his submission refers the Court to the case of *Rejeshkanna Marimuthu v. Abd Wahad Hj Kassim (Pengarah Penjara, Johor Bahru, Johor)* (2003) 1 LNS 581 where the High Court there dealt with a *habeas corpus* application premised on the ground that the conditions of the applicant's detention infringed the Federal Constitution. The learned Judge, though did not grant the *habeas corpus* application, opined as follows:
>
> > The Federal Constitution, in Article 5, refers to a person being unlawfully detained whereas s. 365 of the CPC refers to a person being illegally or improperly detained. The term unlawful is, in my view, wide enough to cover both illegal and improper. *Thus, whilst a detention may be legal it could become one improper detention if some material fundamental term and condition or regulation or rule governing the detention is breached or violated thereby leading to an abuse of the detention* ...
> >
> > In my view there are two distinct and separate parts to every prisoner's detention i.e. the order by a court to detain and then the physical detention itself in an authorised place. I am of the humble view that a lawful detention that commences as a perfectly legal detention can become unlawful if the lawful detention is carried out improperly. *Thus, if the lawful detention is carried out in breach of any fundamental rules or regulations pertaining to condition of detention then the detention itself becomes unlawful and improper and may attract the interference of the High Court* on an application for a writ of habeas corpus.
>
> 19. Learned counsel for the Plaintiff urges this Court to adopt the opinion of the learned Judge in *Rajeshkanna Marimuthu* (*supra*).

20. Attractive as that submission may be, we are unable to agree and we adopt the rationale of this Court in the case of *Ketua Polis Daerah Johor Bahru, Johor & Ors v. Ngui Tek Choi* [2013] 4 CLJ 47 where in dealing with a similar situation there held as follows:

> Since the issue of a remand order under s. 117 of the CPC was an exercise of a Magistrate's criminal jurisdiction, the relevant High Court which has the jurisdiction to set aside the order is a High Court exercising its criminal, appellate or revision power under the CPC and the Courts of Judicature Act 1964. **In the present appeal, the plaintiff neither pleaded the unlawfulness of the remand order/nor challenged the remand order by way of an appeal or revision under the relevant provisions of the CPC**. In the circumstances, the remand order remained a lawful order unless and until it is set aside by a High Court exercising its criminal appellate or revision power. It was not the function of the learned JC in the instant case, in determining a civil claim for unlawful detention, to go behind the remand order and to question its legality or the manner in which it was obtained."

21. The deceased's remand is a consequence of a judicial act, being an order given by a Magistrate on 15 January 2009. Unless and until this remand is set aside by way of a criminal appeal or revision by the High Court, that remand remains lawful. **It is undisputed that no such application to the High Court had been made by the Plaintiff to declare that the remand is unlawful**. Though it is pleaded by the Plaintiff in the pleadings that the detention had become unlawful on grounds stated earlier, it does not help the Plaintiff as we are of the view a separate suit by way of criminal revision should have been commenced and not through this civil suit.

22. It is our respective view the abuses which the deceased endured do not and cannot give rise to a cause of action for false imprisonment. The cause of action for **a tort of false imprisonment** arises when a person has been imprisoned without lawful justification and that action is against the person who caused the imprisonment. **Here the person who caused the detention is a Magistrate exercising his judicial power and that judicial act had not been set aside or declared unlawful**.

23. In *Regina v. Deputy Government of Parkhurst Prison, Ex-Parte Hague* [1992] 1 AC 58 where a similar false imprisonment claim was made premised on the allegation that conditions of detention had become intolerable, the House of Lords held, *inter alia* as follows:

> That although, where the conditions of detention of a prisoner were such as to be intolerable an otherwise lawful detention was not rendered unlawful, such conditions might give rise to public law remedy and, where prisoner suffered injury to health, a remedy in private law as well; such a remedy would lie in negligence rather than in false imprisonment.

Their Lordships also held that there must be a clear distinction between the 'nature of detention' and that of 'conditions of detention'. The nature of detention is a result of a judicial act and remains valid until set aside.

A The conditions of detention do not relate to 'nature of detention' and if such conditions become intolerable or illegal, they give rise not to the tort of unlawful detention.

24. In the case of *Minister of Home Affairs v Chu Choon Yong & Ano*r [1971] 2 MLJ 20, the Federal Court cited with approval a passage from *Andrew s/o Thamboosamy v. Superintendent of Pudu Prisons, Kuala Lumpur* [1976] B 2 MLJ 158 which reads as follows:

> ... when a person complains that he is being illegally or improperly detained, **it is for the detaining authority to justify the detention**. If the person who signed that order had power to do so and had before, when and after signing that order, **complied with all** C **conditions laid down by the law, then the order of detention which is authentic and made in good faith** is sufficient answer, the Court must hold the order and detention lawful - **unless the detainee alleges and can prove *mala fides***.

[emphasis added]

D

[30] It would no doubt be appreciated from the highlighted parts of the above excerpt (paras. 18-24) that:

(a) while a detention may be legal it may still be improperly obtained if some regulation or rule governing the detention is breached resulting in E an abuse of the powers to detain;

(b) any challenge as to the unlawfulness of the remand order is not limited to an appeal or revision under the CPC but could still be pursued if specifically pleaded in a civil action;

F (c) the judicial act of the Magistrate in issuing the remand orders may be declared unlawful if the detainee can prove that it was made or obtained *mala fides* in the first place.

[31] Counsel for the appellant before us urged us to note the distinction that whilst the cause of action in *Kugan*'s case was for 'false imprisonment', the G appellant in the instant case under appeal before us, had specifically pleaded and sought for a declaration that his detention was 'unlawful' for reason that the remand orders were obtained deceptively and/or obtained without sufficient cause being placed before the Magistrate and premised upon such a declaration he was entitled to be compensated for wrongful detention.

H **[32]** Counsel for the appellant also referred to us the decision in *Masa Nangkai & Ors v. Sgt Edwin Nancha & Anor* [2004] 1 LNS 495; [2005] 1 MLJ 581 where the court held that the question whether there was wrongful arrest and detention would very much depend on whether the police had acted within the provision of s. 23(1)(a) of the CPC and to rely I on that section the police had to show they had reasonable or probable cause to effect the arrest in that they had received credible information or held a reasonable suspicion as to the commission of an offence. It was argued that a similar criterion applied when applying for a remand order to facilitate further investigation.

[33] Counsel for appellant also brought to our attention the observations of this court in *PP v. Audrey Keong Mei Cheng* [1997] 4 CLJ 702; [1997] 4 AMR 3584 that while it was not for a Magistrate who was dealing with an application for a remand order (or extension of it) to concern himself or herself with the legality or otherwise of the arrest, yet it was still for the Magistrate to decide at that stage whether there are grounds to believe that the accusations or information was well founded. Counsel submitted that, it therefore followed that it was incumbent upon the police seeking the remand order (or extension) to be forthright when apprising the court of the basis for the alleged suspicion or of the credible information that they relied upon and which required the issue of the remand order or its extension for investigation purposes; otherwise the Magistrate could not make an informed decision on the application.

[34] More significantly, the court in *Audrey Keong*'s case *(supra)* had this to say as well:

> In our judgment, it is mandatory for the police to produce a copy of the diary as prescribed by s 119 of the CPC. The details in such a diary would provide a true picture of the proceedings in the investigation in compliance with s. 119 of the CPC. Since the police, in this case failed to do this, the Registrar would be right, in law, to refuse to order the further detention of the respondent. Furthermore, on our perusal of the contents of the 'letter', we find that nowhere has it been shown that the respondent has committed or been involved in any offence for her further detention in order to complete the investigation. *On the contrary, the information shows that she would, in all probability, only be a potential witness against her husband. We would, without hesitation, hold that it would be an abuse of the process of law for police officers to use the machinery of s 117 of the CPC, in order to compel witnesses or potential witnesses to come forward to assist in their investigations. There are other provisions in the CPC for this purpose.*
>
> Therefore in our judgment since the provisions of s 117 of the CPC has not been remotely complied with, the Registrar was right *albeit* for a different reason, not to order further detention of the respondent.
>
> (emphasis added)

[35] Section 117 of CPC, insofar as was material for determination of the issue at hand is reproduced below:

> 117. Procedure where investigation cannot be completed within twenty-four hours.
>
> (1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 28 **and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall immediately transmit to a Magistrate a copy of the entries in the diary** hereinafter prescribed relating to the case and shall at the same time produce the accused before the Magistrate.

A (2) The Magistrate before whom an accused person is produced under this section may, whether he has or has no jurisdiction to try the case, authorise the detention of the accused in such custody as follows:

(a)

B (b)

(3) The officer making the investigation shall state in the copy of the entries in the diary referred to in subsection (1), any period of detention of the accused immediately prior to the application, whether or not such detention relates to the application.

C (4)

(5)

(6)

(7)

D (emphasis added)

[36] What could be drawn from the above discussion was that a police officer applying for a remand (detention order for further investigation) had a duty to satisfy the Magistrate that there were grounds for believing based E on credible information that the person arrested was involved in a criminal offence and such investigation could not be completed within 24 hours; the accusations must be well-founded. What this meant in other words, was that it was the responsibility of such police officer to produce to the Magistrate sufficient material that would pass an objective test to show at least the F existence of a reasonable basis for the alleged suspicion to justify the remand order to be issued by the Magistrate. The entries in the police diaries that had to be produced when applying for the remand order or extension should also advert to the stage and developments in the investigation under way to support the sufficient cause upon which the Magistrate would thereupon have to make the far-reaching decision to deny one's liberty for that limited G period.

[37] What then was the evidence in this case? The third respondent was the one who had applied for the remand order on the morning of 22 November 2008 from the Magistrate. Part of his testimony under cross-examination was H as follows:

S: Setuju dengan saya, kes ini melibatkan kes peribadi antara wanita bernama Siti Nur Fairus Fadhilah binti Dusry Rojay, suami dan seorang anggota polis bernama Konstabel Mohd Fairus bin Shafiee?

J: Betul

I S: Adakah kamu mengetahui bila Hadi (Plaintif) telah ditangkap?

J: Tiada spesifik. Saya tidak tahu pukul berapa dia ditangkap.

S: Setuju saya katakan, jika kamu tidak tahu bila dia ditangkap bermakna arahan untuk menangkapnya tidak datang daripada kamu?

J: Ya. Arahan bukan daripada saya.

S: Maklumat awal 5 orang yang ditangkap tidak termasuk Hadi?

J: Ya, tidak termasuk Hadi.

S: Setuju dengan saya, kamu menyediakan permohonan reman proceeding berdasarkan 14 orang yang ditangkap?

J: Ya, 14 orang untuk reman kali pertama.

S: Selain daripada 5 orang yang kamu tahu ditangkap, 9 orang lagi yang ditangkap kamu tidak tahu mengapa mereka ditangkap?

J: Sebenarnya saya tahu mengapa mereka ditangkap. Mereka disyaki terlibat dalam kes pergaduhan di Restoran Subaidah, MITC.

S: Berhubung dengan Hadi. Dia ditangkap oleh anggota polis, kamu tidak tahu atas alasan apa?

J: Saya tahu. Anggota yang buat tangkapan mengatakan Hadi disyaki terlibat dalam kes pergaduhan tersebut.

S: Siapakah anggota tersebut?

J: Saya tidak tahu.

S: Bagaimana kamu tahu berkenaan dengan tangkapan mereka yang disyaki terlibat dalam pergaduhan?

J: Bila saya di IPD Melaka Tengah, saya telah menghubungi IPK Melaka. Mereka memberitahu ada 9 orang lagi tahanan baru yang disyaki terlibat dengan kes ini dan ada yang baru hendak buat report. Saya katakan jika baru hendak buat report mesti lambat jadi saya terus ke IPK untuk dapatkan senarai nama untuk buat permohonan reman. Apabila saya sampai di sana saya lihat ada ramai Detektif dengan suspek sekali. Jadi, kesemua yang ada di situ dikategorikan sebagai suspek dalam kes pergaduhan itu.

S: Kamu tidak dapat maklumat terus daripada pegawai penangkap?

J: Tidak ada. Saya terus telefon ke IPK.

S: Setuju dengan saya. Kamu tidak tahu asas mengapa mereka dijadikan suspek?

J: Mereka disyaki sahaja.

[38] The fourth respondent was the officer who had applied for the extension of the remand order issued on 28 November 2008 at GH Melaka. His evidence under cross-examination was in the following manner:

S: Adakah kamu selepas reman diperoleh dari 22.11.2008 sehingga 28.11.2008 reman pertama selama 7 hari dimaklumkan bahawa Plaintif berada di Rally Club ketika pergaduhan berlaku?

J: Ada

S: Adakah perkara ini dicatat dalam Investigation Diary kamu?

J: Tidak ada

S: Adakah kamu mendapatkan pengesahan bahawa beliau berada di Rally Club semasa pergaduhan berlaku?

J: Ada

S: Saya percaya, perkara ini juga dicatat dalam Insvestigation Diary kamu?

J: Tidak ada dicatitkan.

S: Setuju dengan saya, berhubung dengan reman kedua sekiranya perkara ini tidak dicatat dalam investigation diary kamu, perkara ini tidak dimaklumkan kepada Majistret untuk reman kedua?

J: Tidak setuju.

S: Mohon rujuk ikatan E, ms. 7-10.

J: Tidak ada catatan dalam permohonan bahawa Plaintif berada di Rally Club semasa pergaduhan berlaku.

S: Kamu tahu keperluan semasa permohonan reman bahawa peraturan di bawah CPC harus dipatuhi?

J: Saya tahu

S: Adakah kamu tahu semasa membuat permohonan untuk melanjutkan reman, kamu harus memberitahu Majistret apa yang telah dibuat dalam penyiasatan, setakat mana penyiasatan telah dijalankan, apa yang perlu dibuat dan mengapa kamu perlukan beberapa hari lagi?

J: Saya tahu.

S: Berhubung dengan Plaintif dalam permohonan ini, kamu tidak mematuhi keperluan di bawah s. 119 CPC?

J: Saya tidak ingat s. 119 CPC.

Saya bacakan s. 119 CPC.

(1) (a) waktu diterima perintah menyiasat, jika ada;

(b) waktu dimulakan dan ditamatkan penyiasatannya;

(c) nama tempat atau tempat-tempat yang dilawatinya; dan

(d) suatu pernyataan mengenai pendapat-pendapat yang ditentukan melalui penyiasatannya.

S: Adakah perkara-perkara ini dipatuhi?

J: Tidak dipatuhi.

[39] What was obvious from the above evidence in court was that, firstly, the third respondent was not the arresting officer in the case of the plaintiff. There was no denying the fact that only such an arresting officer could vouch as to the circumstances or suspicion to support the remand of the plaintiff for further investigation. To compound matters, the third respondent did not even know who this officer was. What seemed to have happened here was that a group of nine persons had been herded to the court on the morning of 22 November 2008 and the third respondent sort of mechanically obtained the first remand order against the appellant.

[40] Secondly on 28 November 2008, when the extension of the remand was applied for at the hospital, it had already been determined by the police that the appellant was at the alleged time of the fight not at Restoran Zubaidah (MITC) (where the fight under investigation had taken place) but at another location, namely at Rally Club, as had been maintained by the appellant always. Despite the fourth respondent being aware of this fact or development at that stage in the investigation, the Magistrate was not informed accordingly. This result of investigation was also admittedly not recorded in the investigation diary in respect of this case produced to the court.

[41] Having considered the law and having examined the record, we therefore found that there were merits in the submissions of counsel for the appellant, that the first remand order, as well as the subsequent extension, were obtained by the police from the Magistrate(s) without the third and fourth respondents duly complying with the safeguards laid out in law for remand orders to be issued. What was at stake here was the liberty of an individual. The first remand order and the subsequent extension were therefore, in our view, improperly and unlawfully obtained. The police force were charged with the task of protecting the people and they had to act responsibly and within the prescribed limits explicitly provided in law in the exercise of their powers.

[42] Although we might not go so far as to say that the police had wilfully deceived the Magistrate or obtained those orders on a 'lie' (as argued by counsel), it was nevertheless abundantly clear that there was dereliction of duty and obligations bordering on gross irresponsibility on the part of the third and fourth respondents as police officers when applying for those remand orders from the Magistrate. It could not be gainsaid that the first remand order was obtained by the police from the Magistrate without having adduced to the court through the arresting officer (or at the least being able to identify the arresting officer) relevant material to ground reasonable suspicion or other sound basis to detain the appellant. Insofar as the extension order was concerned, what was beyond any dispute from the record was that there was here suppression of a material development in the

investigations at that stage, namely that the appellant's story that he was not at the scene of the fight had by then been verified and confirmed by the police; there was therefore no basis for any further detention of the appellant.

[43] Although the remand order and the subsequent extension order issued by the Magistrate under s. 117 of the CPC were seemingly 'legal' on the face of it, it was the direct lapses and the indifference shown to statutory provisions and procedures by the third and fourth respondents that caused those remand orders to be issued by the court. The Magisterial orders were therefore no cover nor could they be relied upon to absolve the respondents from liability for their dereliction of duties which, it must be reiterated, went to the very root of the validity of those orders obtained by the police from the Magistrate.

[44] It was our unanimous view therefore that the appellant had made out a case for the declaration sought, namely, that his detention by the police from 22 November 2008 to 5 December 2008 was unlawful and he was entitled to be compensated with damages for being denied of his liberty and freedom during that period (apart from the injuries, pain and suffering he was subjected to during that detention, for which he had been awarded damages affirmed above). It was obvious to us that the learned trial judge had not given sufficient consideration to all the surrounding facts in evidence before him. His Lordship had misdirected himself on the law too, in dismissing the further prayer for a declaration that the appellant's detention had been unlawful and refusing to allow consequential orders for damages.

[45] As regards the claim for general damages for unlawful detention attributable to the wrongful acts of the police, we were of the view that RM50,000 as a lump sum was fair and reasonable compensation in all the circumstances of the matter to be awarded to the appellant for the unlawful detention.

[46] We were also of the unanimous view that this was a proper case for exemplary damages to be awarded to register the court's disdain of law enforcement officers want only disregarding the rules and procedures that determine the parameters of their duties and responsibilities. In this case, this had resulted in a serious violation of an individual's dignity and deprivation of his constitutionally guaranteed freedom, what more, by the very same authority who had the duty to protect and safeguard those rights. To overlook and dismiss without adequate remedy this failure on the part of the police force to act within the law, would be to occasion an injustice to the appellant. The public at large, are also all entitled to be given the assurance that the police force has been forewarned to exercise caution and duly comply with all the requirements of the law before any one is denied their liberty, even only if it was for investigation purposes.

[47] James Foong J (as he then was) in *Roshairee Abd Wahab v. Mejar Mustafa Omar & Ors* [1997] 1 CLJ Supp 39 had set the guidelines for awarding exemplary damages in the following terms:

> While considering the request for exemplary damages, this Court must bear in mind that the objective for an award under this category is to punish the defendants, and to display the Court's indignant attitude towards the acts committed by the defendants. However, from the enlightening judgment of Lord Devlin in *Rookes v. Bernard* [1964] AC 1129, such damages must be restricted to situations where there are:
>
> > "... oppressive, arbitrary or unconstitutional action by the servants of the Government" or where "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.
>
> Outside these 2 categories, exemplary damages should not be awarded.

It could not be disputed that it was the respondents' actions, as public servants, in obtaining the remand orders without sufficient cause and in violation of applicable procedures, which had resulted in the appellant's basic constitutional rights of liberty and freedom being infringed and negated in this case.

[48] For the reasons above, we were also unanimous that a further sum of RM50,000 should also be awarded to the appellant as exemplary damages for the unlawful detention that the appellant had been subjected to, directly caused by the mishandling of this case by the police, arising in particular from the third and fourth respondents' flawed respective applications for the remand orders made on 22 November 2008 and 28 November 2008.